

UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

STEWARD HEALTH CARE
SYSTEM, LLC, et al.

v.

BLUE CROSS AND BLUE
SHIELD OF RHODE ISLAND

:
:
:
:
:
:
:

C.A. No. 13-405S

MEMORANDUM AND ORDER

Pending before me for determination (28 U.S.C. § 636(b)(1)(A)) is Defendant's ("BCBSRI") Motion to Compel Production from Plaintiffs ("Steward"). (Document No. 111). Steward objects. (Document No. 117). A hearing was held on June 30, 2016.

The Motion presents two issues. First, BCBSRI questions the completeness of Steward's document production. In response, Steward represents that it has "produced all of the non-privileged responsive documents that were located following a comprehensive (and unchallenged) search, collection, and review." (Document No. 117 at p. 5). BCBSRI's argument is based primarily on supposition and provides the Court with no convincing support for relief under Rule 37.

Second, BCBSRI seeks the production of all documents withheld or redacted by Steward on the basis of the "common interest" doctrine. It argues that Steward did not share a common interest with the Special Master simply because they were parties to the Landmark acquisition, and actually had inherently divergent goals regarding the transaction. Steward counters that it has not claimed privilege over its communications with the Special Master simply because they were parties to an acquisition. Rather, Steward contends that it has applied the "common interest" doctrine only as to communications:

(1) among Steward (and its predecessor, Caritas Christi), Landmark, the Special Master, and their respective counsel and agents; (2) during the times when an executed Asset Purchase Agreement (“APA”) was in place (August 27, 2010 through December 7, 2010 and May 26, 2011 through September 27, 2012); and (3) constituting or reflecting consultation with their respective attorneys for legal advice on “particular matters of common interest” with respect to Steward’s acquisition of Landmark.

(Document No. 117 at pp. 17-18).¹

The common interest doctrine is not an independent basis for claiming privilege. It is an exception to the general rule that the attorney-client privilege is waived when privileged information is disclosed to a third-party. “The common-interest doctrine prevents clients from waiving the attorney-client privilege when attorney-client communications are shared with a third person who has a common legal interest with respect to these communications, for instance, a codefendant.” Cavallaro v. United States, 284 F.3d 236, 250 (1st Cir. 2002). The purpose is to permit “allied lawyers and clients – who are working together in prosecuting or defending a lawsuit or in certain other legal transactions – [to] exchange information among themselves without loss of the privilege.” United States v. Mass. Inst. of Tech., 129 F.3d 681, 686 (1st Cir. 1997).

BCBSRI contends that parties to an acquisition do not share the requisite common legal interest to avoid waiver of shared privileged communications. It also argues that since Steward and the Special Master had inherently divergent goals, they could not have shared a common legal interest. While it is true that Steward was acting in corporate self-interest and the Special Master was acting in the interest of the creditors and the public, they did share a common legal interest in

¹ Plaintiffs represent that they have not invoked the common interest doctrine to the extent a communication between or among these entities was adversarial. (Document No. 117 at p. 18).

the operation of Landmark and consummation of the acquisition during the periods when the APAs were in place.

Neither side cites any case law dealing with this issue in an analogous factual situation. Steward relies upon case law generally holding that the common interest doctrine is not limited to the litigation context and can also apply in transactional contexts. See, e.g., Tele globe USA, Inc. v. BCE, Inc., 493 F.3d 345, 364 (3rd Cir. 2007); see also Kaiser Steel Corp. v. Frates, 84 B.R. 202, 205 (Banks. D. Colo. 1988) (upholding the common interest doctrine between a debtor-in-possession and creditors committee due to common interests in maximizing the value of the debtor's estate).

Here, Steward has shown the presence of a shared common legal interest during the periods that the APAs were in effect. In fact, the Special Master and Steward entered into an Agreement for Advisory Services (Document No. 117-43) in which Steward was engaged to “provide the services of an experienced team of healthcare executives along with such management and services described herein until the consummation of the transactions contemplated in the APA.” Steward also agreed to provide a “Consultant, as well as an additional number of [Steward's] employees as necessary to provide the management and other services described herein.” In addition, the Special Master authorized Steward, “on the Owners’ behalf, to exercise reasonable business judgment in the discharge of its duties hereunder, including oversight, supervision, and effective management of the day-to-day business operations of the Facilities through the Consultant.”² This Agreement reflects an interrelationship and commonality of interest well beyond just being parties to a pending acquisition. While the Agreement does contain a disclaimer of any fiduciary or confidential

² The provision also contained a provision allowing Steward to loan up to \$5,000,000.00 to meet “working capital needs.”

relationship between Steward and the Special Master, it does so in a boilerplate section entitled “Independent Contractors” intended to narrow the potential for liability arising out of the cooperative business relationship created by the Advisory Services Agreement. It does not deal with the issue of sharing privileged communications and cannot reasonably be construed as a clear and unequivocal waiver of the attorney-client privilege by Steward.

Conclusion

For the foregoing reasons, BCBSRI’s Motion to Compel (Document No. 111) is DENIED.

SO ORDERED

/s/ Lincoln D. Almond
LINCOLN D. ALMOND
United States Magistrate Judge
August 4, 2016